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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

STATES OF WISCONSIN, MINNESOTA, OHIO and PENNSYLVANIA, Complainants, vs. STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO, Defendants, STATES OF MISSOURI, KENTUCKY, TENNESSEE, LOUISIANA, MISSISSIPPI, AND ARKANSAS, Intervening Defendants.	No. 5, Original.
STATE OF MICHIGAN, Complainant, vs. STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO, et al., Defendants.	No. 8, Original.
STATE OF NEW YORK, Complainant, vs. STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO, et al., Defendants.	No. 9, Original.

REPLY BRIEF OF THE SANITARY DISTRICT OF CHICAGO TO BRIEF FILED BY COMPLAINANTS ON REPORT OF EDWARD F. McCLENNEN, SPECIAL MASTER

STATEMENT OF THE CASE.

The complainants do not contend in their brief that controlling works are necessary in order to effect a reduction in diversion to 5,000 c.f.s. without danger to the local water supply; they do not contend that the Southwest Side Treatment Works, or its equivalent, cannot be constructed before the end of 1938, assuming available funds; nor do they contend that the Sanitary

District cannot finance the construction program assuming the normal collection of taxes. No attempt is made to show a violation of the decree in any respect.

The argument of the complainants on the facts is devoted to a criticism of what has been done by the defendants as measured by what the complainants conceive the duty of the defendants to be as to engineering detail, and not by the actual efficaciousness of the construction program of the Sanitary District. The complainants, in adopting the hypothesis of the Special Master, have taken as an inflexible and unchangeable standard of the engineering and sanitation problems involved, what they regard as final determinations of the former Special Master, which were not intended to be such, and which were not adopted by the Court except insofar as the Court used these findings as a guide in specifying the dates for progressive reductions in diversion.

The Sanitary District, on the other hand, has proceeded upon the belief that any program adopted by it, which was capable of accomplishment and which when accomplished would make the required reductions possible, would constitute a strict compliance with the decree of April 21, 1930, and would constitute a fulfilment of the duties of the Sanitary District as defined in the opinions of the Court in these causes. We submit that this standard is the only proper measure of performance and constitutes the only reasonable test of diligence.

The Sanitary District in the hearings recently concluded showed that a program was adopted which, in the opinion of its engineers, was capable of accomplishment and which would effect compliance with the decree. The complainants introduced no evidence to the contrary, and do not now contend that the program

adopted by the Sanitary District was incapable of being completed, and would not, when completed, permit the required reductions.

The evidence introduced by the defendants before the Special Master is discussed at length in our opening brief, and there is no necessity for elaboration except for the purpose of demonstrating that certain statements contained in the brief of the complainants, carrying an implication of bad faith, are untrue. Without making direct charges as they did in their Application, because there is no proof, the complainants in their brief endeavor to create the impression that there was bad faith on the part of the Sanitary District in spite of the lack of evidence and the Special Master's finding to the contrary. Half-truths and distortions are resorted to as a means of accomplishing this purpose.

In complainants' statement of the case, on page 8 of their brief, it is said:

> "With the exception of the subjects of inquiry referred to Special Master McClennen, the complainants take the other matters of failure and inadequacy of performance set forth in their Application as established and therefore will not reargue them in this brief. So far, if at all, as any issue may be raised with respect to them, these complainants will rely upon their brief filed with this Court on December 5, 1932."

Inasmuch as the complainants offered no testimony and introduced no evidence whatever before the Special Master on such matters, it is difficult to perceive upon what theory they consider that any disputed averment in their Application is established.

At the hearings the Special Master stated that he would take the statements in the Application as proved, except:

> "Those things in them which are called to my attention by the defendants as disputed, and with these exceptions, because it is obvious from the return and the briefs, these are disputed and are not to be taken as proved."

Then followed a recital of the things which the Special Master said were disputed and not to be taken as proved, which appears on pages 27, 28, 29, 30 and 31 of the record and is appended hereto (p. 39 *infra.*)

In this reply brief we shall divide our argument in two main divisions, following the order of complainants' brief; we shall refer first to the inaccurate or incomplete statements of fact made on behalf of the complainants, and then discuss certain legal questions which require elaboration in view of complainants' argument.

ARGUMENT.

The Facts.

I.

Alleged Causes of Delay in Obtaining Approval of the Construction of Controlling Works.

(a) Steps taken since the entry of the decree for a permit for the construction of controlling works.

The contention is made under sub-head "A" of complainants' brief (pages 15-17). that it is uncontroverted on the record that the defendants have taken no steps since the entry of the decree to apply to the Secretary of War for a permit for the construction of controlling works. This question is discussed at length in the brief of the Sanitary District, pages 12 to 34 inclusive.

In addition to the testimony referred to in our brief which establishes that the Sanitary District took all reasonable steps after the entry of the decree in the making of an application to the War Department, we direct the attention of the Court to the statement of Mr. Ramey, who testified that when the Sanitary District sought to obtain a permit from the War Department for construction it was the customary practice to talk the matter over with the Local Engineer, or with representatives from his office. There was no regulation requiring a formal application addressed to the Secretary of War. No formal applications addressed to the Secretary of War were made by the Sanitary District when permits were sought for bridges or other structures (Ramey, Rec. 820-830). The recommendation of Col. Weeks would be the guiding factor in a decision by the Secretary of War before a permit for controlling works was issued. Col. Weeks was familiar with all the plans previously sub-

mitted and was in a position to act or pass upon the question of controlling works without the resubmission of any of the plans and a formal application. When he told the Sanitary District not to press the matter for the time being the Sanitary District was justified in following his advice as had been the practice.

Counsel also assert (page 16, second paragraph), that the defendants did not make or seek to make any provisions for financing the construction of controlling works when in 1929 the Sanitary District *sought* and obtained from the General Assembly of Illinois authorization for the issuance of $27,000,000 of bonds without a referendum for the prosecution of sewage treatment works at Chicago, and the authorization contained no provision for, and by appropriation to other purposes precluded, the use of any of this money for controlling works. As shown by Exhibit 46, which was a printed appeal to the legislature, the Sanitary District actually sought to obtain authorization for $45,000,000 of bonds for the "Federal program requirements," including "Controlling Works—Chicago River." (See page 30, Exhibit 46.)

Reference is also made, in the same paragraph of complainants' brief, to the resolution passed May 15, 1930, (which resolution the Special Master has included in his report on pages 79 to 82 inclusive) and it is stated by counsel that "this memorial sought no authority to issue bonds for the construction of controlling works."

An examination of this resolution shows that it requested authority to issue bonds without a referendum "for said sewage treatment program to comply with the decision of the Supreme Court above referred to". So that if unlimited authority had been given as requested, the authorization would include not merely the treatment works but all works necessary under the requirements of the decree, including sewers, pumping

stations, controlling works, or, in fact, any and all works that were necessary to effect compliance with the decree.

The complainants in their brief, on page 17, make the statement that "the Board of Trustees of the Sanitary District on January 12, 1933 adopted the 1933 budget without making any provision for financing the construction of controlling works."

On cross examination, Mr. Woodhull, Chairman of the Finance Committee, in answer to a question as to whether or not there was any appropriation in Exhibit 50, the budget for 1933, which provides for the construction of controlling works in 1933 or any subsequent year, stated,

> "* * * that appropriation [$5,000] for locks and dams could prove as an initial appropriation for a dam, which would permit of increase in the event that the plans were approved by the government and we were to go ahead." (Woodhull, Rec. 1334.)

(b) Reasons for not submitting plans after the decree of April 21, 1930, with formal application to the Secretary of War for approval of controlling works.

The complainants contend that the defendants have advanced "four excuses" to justify their failure to make application to the Secretary of War for controlling works in the Chicago River, but that "these supposed excuses * * * involve so many changes in position and are so utterly without substance as to challenge their sincerity."

The complainants (pages 17-33) attempt with ingenious distortion to state the position of the defendants with respect to the construction of controlling works in the Chicago River. The characterization of the *reasons* of the Sanitary District for not proceeding with the construction of controlling works as "four excuses" is improper, and counsel's analysis of the situation is misleading and erroneous.

The position of the defendants is clearly stated in the brief filed on behalf of the Sanitary District (pages 12-20) and we respectfully ask the Court to accept the statement of the Sanitary District concerning its position with respect to controlling works, rather than the position attributed to it by the complainants.

The all important consideration is that the decree when considered with the opinion of the Court in these cases does not contemplate the construction of controlling works as an essential requirement unless necessary to effect the reductions in diversion as specified. After the decision was reached by the Sanitary District that controlling works were not necessary to effect a reduction to 5,000 c.f.s., the Sanitary District was justified in taking no further steps to obtain approval of controlling works to meet the 1935 reduction; before such a decision was reached the Sanitary District was justified in following the advice of Colonel Weeks not to press the matter "for the time being" inasmuch as there was no immediate necessity for the approval of plans.

Counsel intimate (page 19) that the "studies" or plans supplied to the District Engineer in December 1928 by the Sanitary District, were plans that had been previously made. The fact is that the plans submitted to Col. Weeks, the District Engineer, were made after the request for such plans was received. The plans are dated December 27, 1928. (See Exhibit 26.)

Ramey testified that to comply with the request of Col. Weeks the matter was studied in the office of the Sanitary District and plans were submitted to him. (Rec. 397.)

An effort is sought to detract from the importance of the conferences between the Sanitary District engineers and the U. S. District Engineer at Chicago, by referring

to the discussions as "casual and off-hand conversations." (Comp. Br. 31.)

Col. Weeks testified that the conferences "pertained always to the activities of the Sanitary District on matters for which he was responsible to the War Department." (Rec. 492.)

II.

Steps Which Should Now Be Taken to Secure Approval and Prompt Construction of Controlling Works.

In our brief (pp. 86 to 90) we demonstrate conclusively, in our judgment, that there is no necessity for an enlargement of the decree so as to include a compulsory requirement for the construction of controlling works. It has been established that controlling works are not necessary to effect the reduction to 5000 c.f.s. on December 31, 1935, and if such works are necessary to effect further reductions they will be constructed without a compulsory order.

As to the contention of the complainants that the decree should be further enlarged to provide for the appointment of a Mandatory of this Court, we submit that the Special Master on page 38 of his report has briefly but accurately presented the practical reasons why a Mandatory should not be appointed. In our discussion of the law (p. 29 *infra*) we present the legal objections to the appointment of such a Mandatory.

On pages 37 and 38 of complainants' brief issue is taken with the Special Master's conclusion that a Mandatory would be received as a "carpet-bagger." The personal belief is expressed by counsel "speaking off the record," that the Mandatory would be welcomed by the thinking citizens of Illinois. It is respectfully suggested that this

latter view is at variance with the experience and almost universal knowledge of the reactions of a free people living under free institutions and devotedly attached to democratic institutions and forms of government.

III.

Causes of Delay in Providing for Construction of the Southwest Side Treatment Works.

(a) Adequacy of time allowed for physical construction of Southwest Side Treatment Works.

The brief of the Sanitary District, on pages 91-106, presents the record establishing that adequate time was allowed for the physical construction of the Southwest Side Treatment Works and there is no necessity for further discussion on this point in this reply brief.

On page 41 of complainants' brief, reference is made to the finding of Chief Justice Hughes as Special Master that "five and one-half years would be required for physical construction of the [Southwest Side] plant." Such was not the finding of Chief Justice Hughes. His finding was that five and one-half years would be a reasonable time to allow for such construction. The distinction is substantial and material.

Although the question was not included in this Reference, counsel comment (page 42) on certain portions of the West Side plant and certain West Side sewers which were not to be finished until 1936.

In our opening brief we refer to the undisputed testimony that the reduction to 5,000 c.f.s. could be affected with the program that was adopted.

The completion of the unfinished work referred to by the complainants was unnecessary to effect the reduction

to be made on December 31, 1935. (Ramey, Rec. 544, 557-558.)

(b) Acquisition of Site.

The Sanitary District in its brief, on pages 106-117, presents the testimony showing the causes of delay in acquiring a site for the Southwest Side Treatment Works. It is unnecessary to discuss this matter further other than to direct attention to the following incomplete statements contained in complainants' brief.

The statement is made (p. 44) that: "No offers were ever made to property owners and no condemnation suits were ever filed. (McCarthy, R. 1412, 1413)." The reasons why no condemnation suits were filed, although the pleadings for the condemnation suits were prepared, were stated by Mr. McCarthy to be as follows: "Because, as we progressed with the work, the number of objectors from the Board of Education and property owners and others who were petitioning and interviewing the Board of Trustees and objecting to the acquisition of that site for the purpose for which it was to be acquired, and as I understood it advancing for the consideration of the Board an alternative plan or area which they suggested to be acquired by the District." (McCarthy, Rec. 1412).

As to the reasons why offers were not made to any of the owners in answer to a question by the Special Master, Mr. McCarthy stated: "Because of these various objections, the thought was that if we were to—after it had been determined or at least this interference had come along from various objectors, it would not be proper to start a condemnation suit on one little section, and then neglect to take up the entire piece" (McCarthy, Rec. 1413).

In this connection we remind the Court that under the Illinois law before a condemnation suit may be started it is necessary to make an offer to the owner of the property which must be rejected by him if unsatisfactory.

On page 45 of the complainants' brief the following statement is made: "The District stands in exactly the same state of indecision and uncertainty as to where, if at all, the Southwest Side Sewage Treatment Works will be built as it stood on the Re-reference in 1929."

It should be observed as pointed out by the defendants in their brief on page 120 that Mr. Ramey testified: "We are not in the same situation as we were in 1929 with respect to the Southwest Side Plant. We have considerable more information as to the amount of sewage. We have had a check up on the amount of Stockyards wastes. We had studies made of the Southwest Side sewage, considerable work was done on that. I would say that we are in a much better position now to design that plant than we were four years ago." (Ramey, Rec. 582.) And it should also be noted in answer to the following question on cross examination by complainants' counsel: Q. "Mr. Woodhull, did I correctly understand you to testify yesterday that you now regard it as definitely settled that the Southwest Side plant will be constructed on the West Side area?" Mr. Woodhull answered as follows: A. "Correct." (Woodhull, Record 1331).

(c) Preparation of Designs, Plans and Specifications.

Our opening brief, on pages 117-120, shows the progress that has been made in the preparation of designs, plans and specifications for the Southwest Side Project.

On page 46 of the complainants' brief the statement is made that the "1933 budget includes no substantial, if in-

deed it includes any, appropriation for the preparation of contract plans and the completion of designs for any of the large structures of the Southwest Side Treatment Works."

The Special Master on pages 64 and 65 of his report shows that of the amounts appropriated there is available for the design of the Southwest Side Treatment Works $88,280.

On page 46 of the complainants' brief, the following statement is made: "Even these *'meager'* expenditures were made in efforts at acquisition of the site, in reinvestigation of the Stockyards and Packing Town wastes, and in other purely preliminary and *'unfruitful'* studies." (Italics ours.)

Reference is then made to the report of Special Master McClennen (on page 56) indicating by innuendo that the foregoing was the finding and the expression of the Special Master regarding these expenditures. The Special Master's report on this point is as follows: "These investigations were made in the efforts at acquisition of a site, in reinvestigation of the Stockyards and Packingtown wastes, and *in studies for the Southwest Side plant and in some adaptation of West Side plant designs to Southwest Side uses.*" (Italics ours)

At the close of the last paragraph of complainants' brief on page 46, the statement is made: "As stated by Special Master McClennen, no new reason for extended reinvestigation of the Packing Town wastes has arisen since the Re-Reference in 1929 * * * ." The statement of the Sanitary District in its Return (p. 34) that a check on these wastes was required stands admitted. The Special Master in his report on page 56 states: "The investigation into the Stockyards and Packingtown wastes, the Sanitary District at no time has contended, justified a delay as a single factor until January 1, 1936, in the construction of the Southwest Side Treatment Works."

IV.

Steps Which Should Now Be Taken for Construction of Southwest Side Treatment Works or an Efficient Substitute.

The defendants in their brief on pages 120 to 122, inclusive, discuss the matter of the recommendations of the Special Master. There is no necessity for an enlargement of the decree as proposed by the Special Master to expedite performance. As to the additional enlargement proposed by the complainants, the Special Master in his report on page 38 presents the difficulties and the futility of appointing a Mandatory as suggested by the complainants.

Counsel assert (p. 50):

> "The defendants have neither acquired nor selected a site for the Southwest Side Treatment Plant as originally planned, or an adequate substitute."

Attention has heretofore been directed to the testimony of Mr. Woodhull (Record 1331), who said that the site has been definitely selected.

On the same page of complainants' brief (page 50) the following statement is made:

> "The 1933 budget includes no appropriation for the preparation of contract plans and completion of the plans for any of the structures of the Southwest Side Sewage Treatment Works."

As heretofore pointed out in this brief, the Special Master on pages 64 and 65 of his report states that there has been appropriated and is available for the design and for the construction of the Southwest Side Sewage Treatment Works, $88,280.

At the bottom of page 50 and the top of page 51 the following statement is made in complainants' brief:

"While the sewers are essential, Chief Justice Hughes as Special Master found that they are not a controlling factor in the time required for the construction of these works. (Report of Special Master on 1929 re-reference 37, 142 (F).")

A careful examination of page 37 of the report of the Special Master on re-reference shows conclusively that there is nothing on this page in any way substantiating the statement made as above by the complainants. The statement referred to on page 142, sub-paragraph (F) which is part of the conclusions of the Special Master, is as follows:

4. "That the time that should be allowed for the completion of the sewage treatment works above described, is as follows:

* * * *

(F) "That the necessary intercepting sewers pertaining to the above described sewage treatment works should be completed within the time allowed for the completion of the sewage treatment works respectively."

V.

Reasonable and Financial Measures on the Part of the Sanitary District.

The Special Master properly has found in this connection "the Sanitary District is not failing now to pursue the reasonable financial measures now within its control which are necessary in order to carry out the decree of this Court" (Report page 126).

The complainants on page 54 of their brief state that the finding of the Special Master on this point clearly implies that at and after the date of the entry of the decree and before its present financial difficulties arose, the Sanitary District "did not pursue the reasonable finan-

cial measures within its control which were necessary in order to carry out the decree of this Court."

This implication the Sanitary District states is clearly unfounded by the report of the Special Master and is overwhelmingly refuted by the record in this case (Woodhull, 1107-1178). The Special Master in his report on page 78 finds as follows:

> "The complainants contend that the financial plight of the Sanitary District rests squarely upon self-inflicted or self-controlled obstacles on the part of the defendant ** I find that the Sanitary District is not responsible for this."

And the Special Master on page 82 also finds:

> "In the conditions which now exist there is no reasonable financial measures which the Sanitary District can take which it is failing to take."

VI.

Reasonable and Financial Measures on the Part of the State of Illinois.

The Sanitary District submits that there is no immediate emergency which requires financial participation by the State in this sewage treatment program. The Sanitary District is prepared to complete the program as soon as the necessary funds are available and it is endeavoring to obtain these funds. The complainants do not contend that the Sanitary District cannot finance the construction program assuming the normal collection of taxes. In the brief of this defendant, pages 122-137, is contained a complete analysis of the reasonable and necessary financial measures which are proposed to be taken in order to carry out the decree. It is therefore the position of the Sanitary District that at this time an

effort to place the financial burden upon the State of Illinois, assuming without admitting that the obligation is properly a State obligation, would be premature, and such action would not expedite the completion of the construction program. The recommendations of the Special Master for a proposed enlargement of the decree compelling the General Assembly of the State of Illinois to appropriate $35,000,000 annually for the construction program without a referendum vote, or the additional enlargement of the decree for the appointment of a Mandatory as suggested by the complainants, should not be adopted by the Court.

Subdivisions A, B, C, D, E, and F of complainants' brief (pages 57-65) deal with State matters and will not be here discussed.

Subdivision G of Complainants' brief (pages 66-67) refers to powers which in the opinion of counsel might properly be conferred upon the Sanitary District and many requirements are suggested for imposition upon the Sanitary District to increase and make available the large financial capacity of the District.

The position of the Sanitary District and the action being taken by it with respect to some of these measures are presented on pages 130 and 131 of its opening brief.

Complainants in their brief have made ten subdivisions of certain measures that should be taken. The Sanitary District submits the following suggestions in the order corresponding to the ten recommendations made by the complainants:

(1) The Sanitary District is already making an effort to obtain legislation eliminating the referendum provision on bonds for financing the construction program.

(2) As to the matter of assessing real estate at its full value, we submit the Master's Report on

pages 83 and 84, discusses the difficulty of making this change in the statewide policy of the State of Illinois.

(3) At the present time the aggregate of taxes levied in Cook County is greater than the taxpayers are able or willing to pay. Enlightened public authorities and patriotic citizens have been making intelligent efforts to bring about reductions in the cost of government and reductions in the burden of taxation. It is believed that this program meets with the approval of thinking people everywhere.

(4) The same considerations which make (3) above valueless produce the same result when applied to (4).

(5) Should the District be required to collect its own taxes, that would only create confusion and would not result in collecting a single dollar more than would be collected by the county collector.

(6) The Special Master in his Report (pages 86-88) finds that a charge for service would not be of material aid at this time. The sewers of the Sanitary District are not connected to private property in any instance. They are "intercepting" sewers which pick up the sewage brought to them by the primary sewer system built, owned and operated by municipalities other than the Sanitary District.

(7) The Special Master in his Report (pages 85 and 86) concludes that "it is not reasonable to rely in advance on special assessments as a financial resource available in time for the required completion of this program."

(8) Under existing federal legislation, the Reconstruction Finance Corporation has ruled that the Sanitary District's project is not eligible for a loan. The Sanitary District is endeavoring to secure an appropriate amendment to this act.

(9) It may be assumed that if additional laws are necessary to provide for the collection of taxes, the General Assembly will, as in the past, enact such amendments.

(10) The General Assembly, as disclosed by the record, has enacted the necessary laws to aid the collection of taxes in Cook County and throughout the state.

On page 69 of their brief complainants urge the appointment of a Mandatory who shall be vested with power to levy taxes and power to collect the same through United States marshals; with power to issue bonds and power to levy taxes to pay interest and principal and power to collect such taxes through United States marshals, etc. It is respectfully submitted that the Special Master has clearly and concisely shown the futility of such action as expressed in his report at page 37-38:

"The steps so urged are so inexpedient if not futile that they should not be taken, even if this Court has the power."

• • • •

"A commissioner exercising all the powers of the General Assembly of Illinois and all the powers of the Sanitary District under the existing constitution and legislation cannot raise money this year for this particular purpose, until this Court has by its decree imposed a duty upon the State of Illinois to do this work. If the commissioner is to exercise direct powers of this Court superior to those of the Sanitary District and of the General Assembly to levy and to collect taxes and to issue bonds the necessary machinery cannot be set up in time. The commissioner would be received in Illinois as a carpet-bagger. He would need an army of subordinates to make the valuations, the assessments, and the collection of taxes from a reluctant

people. His bonds would not find a ready market in Illinois and would be viewed with hesitation as a novelty elsewhere. He should not be vested with Governmental discretion by the Court for such a huge Governmental project. It would be a serious task for the Court to draft a code of laws to govern his operations. He would have to build up an engineering staff and to exercise a judgment as to what particular kinds of structures should be built and what methods should be used for their construction. These and many more considerations of impracticability condemn the method."

A United States marshal under existing conditions would not be able to collect one dollar more of taxes than the county collector of Cook County is able to do. Should the Court appoint a Mandatory and vest him with power to issue bonds and should the Mandatory proceed to execute such power, we are fully persuaded that his attempted exercise of such power would be wholly unavailing.

The appointment of a Mandatory would be fraught with almost untold possibilities of mischief and would serve no useful purpose whatever.

THE LAW

That the Supreme Court possesses jurisdiction of controversies between states and that this necessarily implies power to enter judgments; that the power to enter judgments necessarily embraces power to enforce those judgments and that these powers are conferred by the Federal constitution no one denies.

Counsel for complainants gloss over and ignore the question of what was adjudged by the decree of April 21, 1930. We contend that the essence and substance of that decree consists of an injunction to restrain diversion of water from Lake Michigan beyond certain specified quantities. That the Court possessed this power is not disputed nor is it disputed that the Court possesses power to enforce that judgment, but subject to the qualification that if and when Congress orders or authorizes other and different quantities of diversion the judgment of the Court is superseded and no longer operative.

In enforcing a judgment the Court may employ only such procedure as is in accordance with due process of law or in other words such procedure as is in substantial accord with the law and usage in England before the Declaration of Independence, and in this country since it became a nation.

No Court possesses unlimited, unqualified or arbitrary power nor may it invent new and unheard of methods to enforce judgments.

The waterway from Lake Michigan to the Mississippi River is now open to navigation as a Federal Project. Upon the opening of this waterway the diversion over 1500 c.f.s. permitted by the decree became lawful for maintaining navigation on the waterway by the act of July 3, 1930. The present diversion is no longer a wrong to complainants to be remedied by this Court.

If we read aright, in their headnote and argument on page 71 of their brief, complainants omit to state their view with reference to the scope of the judgment embodied in the decree of April 21, 1930. However, quite adroitly they convey an implication that the judgment is more than an injunction against water diversion. It

fairly may be inferred that the implication intended was that the decree embodied an order to construct sewage treatment works and appurtenances, intercepting sewers, controlling works, etc.

Of course the decree contains no such order. It is not believed that the Supreme Court intended to be understood as asserting the power to make such an order. Certainly no requirement based on the supposed existence of such power is found in the decree proper.

At the hearing before the Special Master in answer to a question of the Special Master, the counsel for the complainants himself admitted that he does not know whether at the present moment there is a decree that anybody shall build "these works" (Rec. 484).

It is fundamental that under our system of government there is no place for arbitrary and uncontrolled power in any branch or department of government.

With all respect to the conscientious and capable lawyers who represented The Sanitary District of Chicago, it is believed by those now representing the District, that the concession made by them in March, 1930, which is referred to in the report of the Special Master at page 121, conceding the power of the Court to order the construction of sewage treatment works, etc., was made without full consideration and that it was erroneous.

On principles which, to those now representing the Sanitary District, seem fundamental, this Court was and is wholly without legal power or authority to direct or require the construction of sewage treatment works, etc., or their completion, within a specified time. Nor, as above stated, do we believe that this Court intended to be understood as asserting such power.

If it be assumed, for the purposes of argument, that the Court possessed the power (negatively, by injunction) to permit diversion of water and to require the

progressive diminution of such diversion, that would be the utmost extent of its regard. The permission to divert might, it is true, be conditioned upon the construction of sewage treatment works. But if the defendants chose to refuse or omit to perform the condition, it is our view that the only penalty could be that of a withdrawal of the permission to divert. We are wholly unable to perceive any source from which could be derived the power to compel the construction of sewage treatment works. Those who assert the existence of such power should be able to point to the source from which it is derived.

We think no other inference from the argument of complainants (pages 71 to 86 of their brief) is permissible than that they assert (a) that the Supreme Court possessed power to order the defendants to construct sewage treatment works, etc.; (b) that the Court exercised that power and made such order; (c) that the Court lawfully may enforce such order by "any measures it may deem expedient."

We address ourselves to their argument on that assumption.

This Court many times has announced the rule that it will exercise only such jurisdiction as was given it by the Constitution, and will proceed only according to the established usages and modes of procedure.

Thus, in the case of *Luther* v. *Borden*, 7 How. 1, the Court, speaking through Chief Justice Taney, said (page 47):

> "The high power has been conferred on this court of passing judgment upon the acts of the State sovereignties, and of the legislative and executive branches of the federal government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should

be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums."

The above language was quoted with approval in the case of *Taylor and Marshall* v. *Beckham,* 178 U. S. 548.

And in *Fisher* v. *Cockerell,* 5 Pet. 248, the Court speaking through Chief Justice Marshall said (p. 259):

"In the argument, we have been admonished of the jealousy with which the states of the Union view the revising power intrusted by the constitution and laws of the United States to this tribunal. To observations of this character, the answer uniformly given has been, that the course of the judicial department is marked out by law. *We must tread the direct and narrow path prescribed for us.* As this court has never grasped at ungranted jurisdiction, so will it never, we trust, shrink from the exercise of that which is conferred upon it." (Italics ours.)

In *Kilbourn* v. *Thompson,* 103 U. S. 168, the Court said (pages 190, 191):

"It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers con-

> fided the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."

Language peculiarly applicable to the complainants' demand for the appointment of a mandatory with powers unprecedented and unheard of in American jurisprudence, and to suggestions that the Court amend its decree by incorporating orders requiring the financing of construction and the construction of sewage treatment works, etc., is found in the case of *Smith* v. *Turner,* 7 How. 283, at pages 428 and 429:

> "That is a very narrow view of the Constitution which supposes that any political sovereign right given by it can be exercised, or was meant to be used, by the United States in such a way as to dissolve, or even disquiet, the fundamental organization of either of the States. The Constitution is to be interpreted by what was the condition of the parties to it when it was formed, by their object and purpose in forming it, and by the actual recognition in it of the dissimilar institutions of the States. The exercise of constitutional power by the United States, or the consequences of its exercise, are not to be concluded by the summary logic of ifs and syllogisms."

Very much in point also is language used in *United States* v. *County of Macon,* 99 U. S. 582, at page 591:

> "We have no power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize. *We cannot create new rights or confer new powers.* All we can do is to bring existing powers into operation. In this case it appears that the special tax of one-twentieth of one per cent has been regularly levied, collected, and applied, and no complaint is made as to the levy of the one-half of one per cent for general purposes. What is wanted is the levy beyond these amounts, and that, we think, under existing laws, we have no power to order." (Italics ours.)

And in the case of *California* v. *Southern Pacific Co.*, 157 U. S. 229, in speaking of its original jurisdiction, the Court through Chief Justice Fuller said (page 261):

> "The jurisdiction is limited and manifestly intended to be sparingly exercised, and should not be expanded by construction."

In the case of *Ex Porte Bollman and Swartwout* 4 Cranch 75, at page 93, Chief Justice Marshall said:

> "**** courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."

The Supreme Court does not possess (and, of course, has never claimed to possess) arbitrary power to proceed in any manner it may choose. Under our system of government there is no room for arbitrary, unlimited and unqualified power in any branch or department of any government. In all cases not specifically covered by statutory provisions procedure must be in accordance with established and recognized usages and modes of procedure; it must be in accordance with "due process of law"; that is to say, it must be in substantial accord with the law and usage in England before the Declaration of Independence, and in this country since it became a nation.

Lowe v. *Kansas*, 163 U. S. 81, 85.
Murray v. *Hoboken Co.*, 18 How. 272, 277.
Dent v. *West Virginia*, 129 U. S. 114, 124.

In the case of *Dent* v. *West Virginia*, 129 U. S. 114, will be found an exhaustive exposition of the meaning of the term "due process of law." In the opinion by Mr. Justice Field, the Court in considering whether certain legislation was violative of the "due process" requirement, among other things said that the requirement of "due

process of law" was designed to secure the subject against the arbitrary action of the crown and place him under the protection of the law. It was deemed to be equivalent to "the law of the land." Further discussing the matter the Court said at page 124:

> "In this country, the requirement is intended * * * to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property. * * * legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters; that is, by process or proceedings adapted to the nature of the case. The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen."

And quoting from an earlier case, the Court said (page 124):

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

In the case at bar we submit that the proposed procedure is wholly unknown and directly contrary to established law and usage; that it is in violation of the fundamental principles upon which this government is founded in that it ignores the right of a sovereign state to control its internal affairs and usurps the governmental functions of the state.

The general principles announced in adjudicated cases by this Court clearly negative the idea that the Court pos-

sesses the implied power attributed to it by the complainants.

In the case of *Osborn* v. *U. S. Bank,* 9 Wheat, 738, Chief Justice Marshall said (p. 866):

> "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."

In the case of *In Re Duncan,* 139 U. S. 449, the Court said (p. 461):

> "By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities."

In the matter of *Heff,* 197 U. S. 488, 505, the Court held that in the United States there is a dual system of government, National and State, *each of which is supreme within its own domain;* and that it is one of the chief functions of the Supreme Court of the United States to preserve the balance between them.

In answer more specifically to the contention of the complainants that the Court should appoint an officer with power to coerce all the instrumentalities of the State necessary to carry out the construction program prescribed by the Court, we submit that such procedure manifestly would be a usurpation of the sovereign powers of the state; and furthermore, that such a contention is based on the erroneous assumption that the Court has jurisdiction to decree the construction program.

We maintain that in the instant case, the jurisdiction of the Court extended only to the power to determine the validity of certain acts of Congress, and the permit of the Secretary of War.

No order or direction prescribing a program of sewage treatment construction was embodied in the decree nor does it appear that the court undertook in any way to make such an order. Had the Court made such an order, it would undoubtedly have exceeded its jurisdiction, and as a matter of law such action would have been *coram non judice.*

But even assuming for purposes of argument that the Court has such power, its order lawfully could not be enforced in the manner proposed by the complainants.

Such procedure would involve the levy and collection of taxes which elsewhere we have shown is not a judicial function. Such procedure would be an invasion of the internal affairs of a State which affairs we have shown are exclusively within the power of the State. Such procedure would be in violation of section 4 of Article IV of the United States Constitution which guarantees every state a republican form of government; and such procedure would deprive the people of the State of their right to have their affairs administered by officials se-

lected by them, which right is the distinguishing feature of a republican form of government.

In answer to the recommendation of the Special Master that the Court should compel the legislature of Illinois to issue bonds to carry out the construction program, and that the bonds could be issued without a referendum, we submit that even on the assumption that the Court has the power to order the construction program, the Court is without jurisdiction to coerce the legislature to do a thing expressly forbidden by the State constitution which they have sworn to uphold and obey.

The principles announced in the case of the *Commonwealth of Kentucky* v. *Dennison*, Governor 24 How. 66, would preclude the Court from exercising the proposed coercive power.

In that case in discussing the power of a State Governor under the extradition act, Chief Justice Taney said (pp. 107-108):

> "The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the

rank and dignity to which he was elevated by the State.

"It is true that Congress may authorize a particular State officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced, or punished for his refusal. And we are very far from supposing, that in using this word 'duty', the statesmen who framed and passed the law, or the President who approved and signed it, intended to exercise a coercive power over State officers not warranted by the Constitution. But the General Government having in that law fulfilled the duty devolved upon it, by prescribing the proof and mode of authentication upon which the State authorities were bound to deliver the fugitive, the word 'duty' in the law points to the obligation on the State to carry it into execution."

In the case of *East St. Louis* v. *Zebley*, 110 U. S. 321, the Court said (pp. 324, 325):

"The further award of the annual sum of ten thousand dollars to the relator, payable out of the remaining seven-tenths of the one per cent. levy cannot be justified. That fund, by the terms of the charter of the city, under which the bonds were issued, is authorized for the purpose of paying the necessary current expenses of administration, not including payments on account of the bonds of the municipal corporation. And admitting that any surplus of such fund, in any year, remaining after payment of such expenses, ought to be applied to the payment of the interest and principal of the bonds, that could only be required when such surplus should have been ascertained to exist. In the present judgment the court has undertaken to foresee it, and by mandamus to compel the city, by limiting its expenditures for its general purposes, to create the surplus which it appropriates. But the question, what expenditures are proper and necessary for the municipal administration, is not judi-

> cial; it is confided by law to the discretion of the municipal authorities. No court has the right to control that discretion, much less to usurp and supersede it. To do so, in a single year, would require a revision of the details of every estimate and expenditure, based upon an inquiry into all branches of the municipal service; to do it for a series of years, and in advance, is to attempt to foresee every exigency and to provide against every contingency that may arise to affect the public necessities."

To the same effect is the case of *Clay County* v. *McAleer*, 115 U. S. 616, 618, 619.

In regard to the question of the power of the legislature to issue bonds without a referendum we submit that if the legislature did so it would violate section 18 of Article IV of the Constitution of Illinois; and that the Court lawfully could not compel the legislature to do an act on contravention of the Constitution.

What was said in *Louisiana* v. *Jumel*, 107 U. S. 711, fully supports our contention.

In that case the Court held among other things that it had no power to compel State officers to do what the State Constitution prohibited. Two suits were consolidated in the case. The action pertinent to our controversy was a mandamus proceeding against State officials. The Court said (721):

> "The relief asked will require the officers against whom the process is issued to act contrary to the positive orders of the supreme political power of the State, whose creatures they are, and to which they are ultimately responsible in law for what they do. They must use the public money in the treasury and under their official control in one way, when the supreme power has directed them to use it in another, and they must raise more money by taxation when the same power has declared that it shall not be done."

The Court further said (727):

> "The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. *It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place.* When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State. In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power." (Italics ours.)

That the case of *Louisiana* v. *Jumel, supra,* is an authority for the proposition that a court will not compel a State official to do what is prohibited by law is shown by the construction of the case in the case of *Rolston* v. *Missouri Fund Com'rs.,* 120 U. S. 390 as follows (411):

> "It is next contended that this suit cannot be maintained because it is in its effect a suit against the state, which is prohibited by the Eleventh Amendment of the Constitution of the United States, and *Louisiana* v. *Jumel,* 107 U. S. 711, is cited in support of this position. But this case is entirely different

> from that. There the effort was to compel a state officer to do what a statute prohibited him from doing. Here the suit is to get a state officer to do what a statute requires of him."

In the case of *United States* v. *County of Clerk*, 95 U. S. 769, the Court also said (p. 773):

> "It need not be said that no court will by mandamus compel county officers of a State to do what they are not authorized to do by the laws of the State. A mandamus does not confer power upon those to whom it is directed. It only enforces the exercise of power already existing, when its exercise is a duty."

The case of *The People* v. *Barnett*, 344 Ill. 62, cited by the Special Master in support of the proposition that the legislature could issue bonds for the construction program without a referendum is not even remotely relevant.

In that case the court said merely in effect that there was no general provision in the constitution requiring all laws to be submitted to referendum; that a referendum was necessary only where the constitution required a referendum; and that the legislative act in that case did not come within the exception.

In concluding this branch of our discussion, we submit that if the Court should establish the extreme and violent doctrine for which the complainants contend, it would transcend the customary and legitimate sphere of judicial power, would prostrate the rights of the people of sovereign states, would produce under the guise of judicial enforcement of a judgment, a centralization of Federal power similar to a judicial dictatorship, and would cause the utter destruction of the autonomy of the sovereign states.

Furthermore, the Court would be pronouncing a rule of decision which would serve as a most dangerous

precedent, the momentous consequences of which scarcely can be estimated.

Even if the Court had such power (which we, of course deny) the mischief of its exercise in the case at bar would be wholly disproportionate to the object to be attained. It would be far better that the judgment should remain unexecuted than to be enforced by the method proposed. Judgments of this Court have remained unexecuted. The case of *Worcester* v. *Georgia,* 6 Pet. 515, is a celebrated instance. In that case Chief Justice Marshall ordered the release of Worcester on the ground that the state law under which he was imprisoned was unconstitutional. The governer of Georgia refused to obey the mandate of the court. Andrew Jackson (then President) refused to aid the court and said: "John Marshall has made the decision, now let him execute it." No attempt at enforcement of the mandate was ever made.

Moreover the through waterway is now open for navigation, and upon the opening of the waterway for navigation the flow over 1,500 c.f.s. became lawful for the purpose of maintaining navigation on the waterway. Because of this situation, there now exists no wrong for the court to remedy.

Mr. Justice Taft, in his decision in 278 U. S. 367, 410, says:

> "*And in so far as the prior diversion was not for the purpose of maintaining navigation* in the Chicago River, *it was without any legal basis because made for an inadmissible purpose.* It, therefore, is the duty of this court by an appropriate decree to compel the reduction of the diversion to a point where it *rests on a legal basis* and thus to restore the navigable capacity of *Lake Michigan to its proper level.* *** *The situation requires the District to devise proper methods* for providing sufficient money and to construct and put in operation with all reasonable expedition adequate plants for the

disposition of the sewage through other means than the lake diversion.

"Though the restoration of just rights to the complainants will be gradual instead of immediate, it must be continuous and as speedy as practicable, and must include everything that is essential to an effective project. ***

"To determine the practical measures needed *to effect the object just stated* in the period required for their completion there will be need for an examination of experts; and the appropriate provisions of the necessary decree will require careful consideration." (Italics ours)

Observe from this language that navigation is a proper purpose for diversion and when water is diverted for navigation, the diversion rests on a legal basis. The proper level of the lake is not absolutely fixed. The proper level is that level which obtains when no water is drawn off for an inadmissible purpose. The level may be reduced by water diverted for a legitimate purpose under approval of Congress or the Secretary of War but in such an event the reduced level becomes the proper level.

Under the theory of the Court, the diverting of water for an improper purpose created a situation which required "the District to devise proper methods *** and put in operation *** adequate plants for the disposition of the sewage ***."

The Rivers and Harbors Act of July 3, 1930 and the opening of the waterway completely changed the "situation" to the extent that it made the diversion proper and the wrong complained of has been obviated and there are no "just rights" to restore.

Mr. Justice Holmes, in 281 U. S. 179, 197, said:

"***the defendants are doing a wrong to the complainants and *** they must stop it."

By virtue of the Rivers and Harbors Act of July 3, 1930, and the opening of the waterway the wrong referred to has ceased to exist and, therefore, there is nothing for the court to remedy and there is no reason for retaining jurisdiction.

The Court cannot retain jurisdiction merely because of an apprehension that the Sanitary District may not be able to complete sufficient construction to permit the required reduction in diversion at the end of 1935, as required by the Rivers and Harbors Act. A Court cannot anticipate that such a thing will happen. In any event, it would only be upon a case properly presented in which it is alleged that the reduction required by the Act of July 3, 1930 can not be effected, that the court could assume jurisdiction.

Before the opening of the waterway the present 6,500 c.f.s. diversion has not been permitted as a matter of right but in a sense has merely been allowed under the indulgence of the Court. The Sanitary District need no longer depend on this indulgence, but now asserts a right under the Rivers and Harbors Act of July 3, 1930 which has not as yet been assailed as invalid for any reason.

As the defendant has heretofore submitted additional legal authorities, on the question as to whether or not the Court is without power or jurisdiction to grant the relief sought by the complainants, in the brief filed in opposition to complainants' motion of October 3, 1932, it will be unnecessary at this time to re-state the authorities as presented in defendant's brief or the contentions of the defendant as therein advanced. Such repetition would be needless, and the defendant will rest upon the authorities submitted in its present and previous briefs.

It is earnestly urged that the findings of the Special Master adverse to the Sanitary District, and the rec-

ommendations of the Special Master, and the suggestions offered by the complainants, should not be adopted.

The Sanitary District submits that the jurisdiction of the Court has been materially affected by the passage of the Rivers and Harbors Act of July 3, 1930. The Court is without power to grant the relief sought by the complainants or to enlarge the Decree as recommended by the Special Master.

The charges of bad faith, obstructions, avoidance, circumvention, delay, negligence, incompetence, dereliction and defiance, as alleged in the complainants' Application, have not been sustained. The record is undisputed that the Sanitary District has endeavored conscientiously and with an earnest purpose to comply at all times with the decree of this Court. This Reference has not been occasioned by any act of the Sanitary District, and therefore the costs, including the fees of the Special Master, should be taxed against the complainants, who, without just cause, initiated the present proceeding.

Respectfully submitted,

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APPENDIX

Special Master's Recital of Things Contained in the Application of Complainants Which Are Not to Be Taken as Proved Without Substantiating Evidence.

Page 9, second paragraph, second line, the following; the words: "Its performance under the decree has been at all times meager and inadequate, and much of the time negligible."

Two lines lower: "All performance under this decree has substantially ceased."

The next: "The semi-annual reports of The Sanitary District of Chicago are on file with this court further disclose, as hereinafter more particularly set forth, that there has been either no effort or progress in the performance of the work on the controlling factors in the program required, or that such effort and efforts have been wholly inadequate, and that the action of the defendants in those respects has been, whether so intended or not, wholly consistent with an effort to obstruct, avoid and circumvent performance of the decree."

Page 12, prior to Section IX: "This claim of a necessity to study the extent of the stock yards waste as a reason for postponing the commencement of the Southwest side project cannot be made in good faith, and must be advanced solely in an effort to delay, avoid and circumvent the performance of the decree of this court."

Page 13, at the end of Section IX: "The Suit of the Sanitary District in the Federal Court has not been prosecuted diligently or in good faith, and that the Sanitary District of Chicago, aided and abetted by the State of Illinois, is putting forward such suit merely with the

purpose and intent of thereby attempting to delay, avoid and circumvent the performance of this court's decree."

Page 13, Section XI: "The State of Illinois and The Sanitary District of Chicago, through negligence, incompetence or bad faith, have failed, neglected and refused adequately and reasonably to provide for financing the performance of this court's decree."

Page 14, a quarter of the way down the page: "A failure due to incompetence, neglect or bad faith, to levy and collect normal taxes at any time since the decree of this court became effective."

Page 15, beginning at the second line: "This difficulty arose from a self-created obstacle to-wit, from the fact that through negligence, incompetence or bad faith, normal and usual taxes, etc."

Page 15, the ninth line, the words: "By reason of the negligence, incompetence or bad faith."

The same page, beginning six lines before Section XII: "This negligence, incompetence or bad faith."

Page 15, Section XII: Beginning with the third line: "Rests upon the neglect, failure and/or refusal of the various authorities of the State of Illinois to levy and collect the proper taxes."

Next: "This ground of alleged inability presently to proceed with the decree."

Next page, 15, beginning with the last line: "The credit of The Sanitary District of Chicago is ample to finance these expenditures and the financial stringency of Chicago, which has existed since prior to 1929, is not due to a general depression, but to the negligence, incompetence or dereliction of duty of the officers and officials of the State of Illinois and her political subdivisions."

Next page, 16, Section XIV: "By a course of conduct

characterized by neglect, incompetence, defiance or bad faith, as the case may be, the Sanitary District of Chicago has wholly failed to make any real, substantial and good-faith effort to perform the decree of this court, and has wholly failed to make reasonable, substantial and bona fide progress in carrying out that decree."

Next, on the same page, 16, at the beginning of Section XV: "The Sanitary District of Chicago wilfully disregarded and defied the Federal Government and presumed upon the solicitude of the Government."

Page 17, on the sixth line, the words: "To prevent, hinder or impede a restoration to the petitioners."

Page 18, beginning in the second line: "It is the plan, intention and purpose of the Sanitary District of Chicago and the State of Illinois, by similar means and similar methods, to delay, avoid and circumvent the performance of the decree of this court."

Next page, 18: Section XVI: "It was and is the absolute ministerial duty of the members of the Legislature of the State of Illinois, and every officer of the State of Illinois, and of every officer of The Sanitary District of Chicago, and of every officer of every other political subdivision, agency or instrumentality of the State of Illinois to take the necessary steps."

Next, the second sentence in the same paragraph: "The State of Illinois, its legislature, officers and agents, have failed, neglected and/or refused to carry out the decree of this court."

Three lines lower down: "It is not the intention of the authorities of the State of Illinois or of The Sanitary District of Chicago to carry out and perform this decree as ordered and adjudged by this court."

Next; in the same line: "It is the intention of the

authorities of The Sanitary District of Chicago, aided and abetted by the authorities of the State of Illinois, so to obstruct, delay, avoid and circumvent the performance of this decree."

Page 19, the sixth line: "Your petitioners further aver that they are without remedy unless this court, in the exercise of the power conferred upon it under the Constitution in controversies among the states of the Union, etc."

Opinion 289 U.S. 395
Decree 289 U.S. 710 and 281/666

Office Supreme Court,
FILED
JUN 14 1933
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

STATE OF WISCONSIN, et al., *vs.* STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO, et al.	No. 5 Original.
STATE OF MICHIGAN, et al., *vs.* STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO, et al.	No. 8 Original.
STATE OF NEW YORK, et al., *vs.* STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO, et al.	No. 9 Original.

PETITION FOR REHEARING.

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IN THE

Supreme Court of the United States

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STATE OF WISCONSIN, et al., vs. STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO, et al.	No. 5 Original.
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PETITION FOR REHEARING.

To the Supreme Court of the United States:

The State of Illinois respectfully petitions that the Court grant a rehearing in the above entitled causes for the following reasons:

I.

Before the Court impose, by the addition of a paragraph to the decree, a requirement upon the State of Illinois separate and distinct from the provisions of the

decree applicable to the Sanitary District of Chicago, the State of Illinois asks the Court to give consideration to rights of the State which have always been asserted throughout this proceeding and defenses based thereon but which because of the course of the litigation, have not, as we understand the record, been given consideration.

The amended bills herein claimed that the diversion of water from Lake Michigan by the Sanitary District lowered the levels of the Great Lakes by not less than 6 inches, to the injury of the complainants; that this diversion had not been authorized by Congress, and was in violation of the Act of Congress of March 3, 1899. The defendants denied the injuries and averred the diversion was authorized by the laws of Illinois, the acts of Congress and permits of the Secretary of War, and pointed to specific benefits to navigation resulting from the diversion on the waterway from Lake Michigan by way of the Mississippi to the Gulf.

On reference to the Special Master the principal defense was reliance upon the validity of the permit of the Secretary of War issued March 3, 1925, with the condition of which, it was established, the Sanitary District had complied. *But the State of Illinois asserted other defenses.* It pointed to what we have termed the rule of equitable apportionment, as established by this Court in *Kansas* v. *Colorado,* 185 U. S. 125, and applied in other controversies between states involving diversions of water from interstate channels. Illinois asserted that standing on a plane of equality with the complainant states, it possessed a right to appropriate a reasonable portion of the waters of Lake Michigan. It was also contended that an equitable appraisement of the relative necessities and benefits to the State on the one side as

contrasted with the comparatively slight injury claimed by the complainants, would result in an allowance to Illinois of at least its reasonable requirements. Other defenses of laches, acquiescence, etc. were also pressed.

The Special Master sustained the first ground of defense and held that the permit of March 3, 1925 was valid and consequently that the acts of the defendant Sanitary District, performed in compliance therewith, were legal and hence that no legal damage resulted to the complainants. Having reached this conclusion, he found it unnecessary to consider the other defenses.

On the argument before the Court on the Master's report, the defendants naturally sought to sustain the Master's position, but in their brief, as pointed out in the present brief of the State of Illinois in the pending proceeding (Brief of Illinois on Report of Special Master McClennen, pp. 47-49), the defendants again asserted their right to the rule originally announced in *Kansas* v. *Colorado,* and alleged that a fair appraisal of the contrasted benefits and burdens resulting from the taking of water by the upper riparian defendants would justify the defendants.

We respectfully submit that the Court in its opinion on the merits in this case did not *and on the record before it could not,* deal with this defense. The necessary findings of fact were not made by the Special Master. Because of the way in which the Special Master had dealt with the facts and law, he deemed it unnecessary to attempt any apportionment of the waters of Lake Michigan as between the complainant and defendant states. No finding by him involved the application of the rule of *Kansas* v. *Colorado,* nor was any conclusion of facts on this matter set forth in his report.

The Court, at pages 409-410 of its opinion (278 U. S.

399), summarizes the issues in the case and, we submit, this summary shows that the defenses put forward by the State of Illinois—its rights under the rule of equitable apportionment as established by the previous decisions of this court in *Kansas* v. *Colorado*—were not considered in this case.

As to the conclusion of the Special Master, the Court found the permit of the Secretary of War had been lawfully issued within the authority vested in him by the Act of March 3, 1899, because required by an emergency which was created, as the Court decided, by the wrongful acts of the defendants, and that the complainants were entitled to an injunction to prevent the continuance of these wrongful acts.

We suggest that any application of the doctrine of equitable apportionment of the waters of Lake Michigan as between the complainant and defendant states, would necessarily allow to Illinois some portion of those waters and that as to such amount of diversion, the acts of the defendants were not "wrongful", but clearly within the right of Illinois. The Court's conclusion recognized no right whatever in so far as the acts in question are concerned.

This is further demonstrated, we submit, by the fact that the Court pointed to one of the findings of the Special Master—that diversion to some extent was needed to maintain navigable conditions within the harbor of Chicago—and in resubmitting the cause to the Special Master to recommend an appropriate decree, the Court said:

> "'In increasing the diversion from 4167 cubic feet a second to 8500, the drainage district defied the authority of the national government resting in the Secretary of War. And in so far as the prior diversion was not for the purposes of maintaining navi-

gation in the Chicago River, it was without any legal basis, because made for an inadmissible purpose. It is, therefore, the duty of this Court by an appropriate decree to compel the reduction of the diversion to a point where it rests on a legal basis, and thus to restore the navigable capacity of Lake Michigan to its proper level. The *Sanitary District authorities*, relying on the argument with reference to the health of its people, had much too long delayed the needed substitution of suitable sewage plants as a means of avoiding the diversion in the future. Therefore they cannot now complain if an immediately heavy burden is placed *upon the District* because of their attitude and course. The situation *requires the District* to devise proper methods for providing sufficient money and to construct and put in operation with all reasonable expedition, adequate plants for the disposition of the sewage through other means than the lake diversion." (Italics ours.)

In the Special Master's report on re-reference at page 4, the questions submitted to him by the Court are definitely stated. The only question submitting the amount of diversion was as follows:

> "What diversion, if any, of water from Lake Michigan will be necessary for the purpose of maintaining navigation in the Chicago River as a part of the Port of Chicago, after these sewage disposal works are in full operation?"

The harbor of Chicago as shown by the record and the original Special Master's report was a part of interstate navigable channels then under regulation and control by the federal government. Navigation necessities in this Port are not the necessities and requirements of the State of Illinois, but those of the United States.

We respectfully submit, therefore, the allowance of a diversion of 1500 c. f. s. for the purpose of maintaining navigable conditions in the Port of Chicago cannot be deemed an application of the rule of equitable appor-

tionment, and is in no sense a recognition of either the necessities of the State of Illinois or of its right to appropriate a fair and equitable portion, as between it and sister states, of the waters of Lake Michigan.

The defendants, as this Court can well believe, carefully studied this opinion, and finding in the language last quoted a recognition of the policy adopted by the defendants to have the sewage problem handled by the Sanitary District, as distinguished from the State, and in view of the fact which was proved before the Special Master on re-reference, that the District had already adopted a plan for the construction of plants designed to treat sewage artificially, the defendants felt their only concern as a practical problem under this decision was to obtain in the hearing before the Special Master a reasonable time, properly adjusted to practical necessities and particularly taxable income, in which to carry out the program they had already adopted.

On re-reference the Special Master fully met the suggestion in the above language of the Court and imposed by his recommendations a heavy and immediate burden upon the Sanitary District, but a burden, heavy as it was, which the Sanitary District within its normal capacity could safely assume.

The later phase of the case, occasioned by the unanticipated failure of the District to obtain the funds with which to carry out its program because of the depression, has involved, we respectfully submit, an entirely different procedure. The Court in its recent opinion and order has added a paragraph to the original decree defining a "requirement" that the State of Illinois as distinguished from the Sanitary District undertake financial measures by which the program may be completed.

Since the Court now seeks to impose upon the State of Illinois a specific requirement as distinguished from the obligations heretofore imposed by the Court's decree upon the Sanitary District, the decree having been determined upon a finding that the District possessed capacity to meet these requirements, the State of Illinois respectfully asserts its right now to have consideration given to defenses always urged by it in this proceeding and which are valid, as we understand the decisions of this Court. We rely upon the following cases:

Kansas v. *Colorado*, 185 U. S. 125.
New York v. *New Jersey*, 256 U. S. 296.
Wyoming v. *Colorado*, 259 U. S. 419.
Connecticut v. *Massachusetts*, 282 U. S. 660.
New Jersey v. *New York*, 283 U. S. 336.

In *Connecticut* v. *Massachusetts*, 282 U. S. 660, this Court said (p. 670):

> "The determination of the relative rights of contending states in respect to the use of streams flowing through them does not depend upon the same consideration and is not governed by the same rules of law that are applied in such states for the solution of similar questions of private right * * * It seems that the principles of right and equity shall be applied having regard to the 'equal level or plane on which all the states stand, in point of power and right, under our constitutional system,' and that upon consideration of the pertinent laws of the contending states and all other relevant facts, this Court will determine what is an equitable apportionment of the use of such waters."

In *New Jersey* v. *New York*, 283 U. S. 336 (p. 343) the Court said:

> "The removal of water to a different watershed obviously must be allowed at times *unless states are to be deprived of the most beneficial use on formal grounds.* In fact it has been allowed repeatedly and has been practiced by the states concerned." (Italics ours.)